Jazuli bin Mohsin v Public Prosecutor

HIGH COURT (MALACCA) — CRIMINAL APPEAL NO 52-1-88
WAN YAHYA J
24 JANUARY 1990

Criminal Law — Corruption — Policeman soliciting gratification for himself — Facts to be proved — Presumption that gratification received corruptly — Presumption to be disproved by accused on balance of probability — Trap money — Whether gratification — Prevention of Corruption Act 1961, ss 2, 4(a), (c) & 14

Evidence — Adverse inference — Prosecution making witness available to defence — Prima facie case established — Whether failure of prosecution to call witness raises presumption of adverse inference — Evidence Act 1950, s 114(g)

Criminal Procedure — Charge — Framing of — Accused charge for soliciting gratification for himself — Complainant suggesting that others had also made demands for money — Whether charge should have included other demands — Whether common intention existed to share money

Criminal Procedure — Sentencing — Corruption — Failure of trial judge to take into account punishment under s 13 of Prevention of Corruption Act 1961 — Sentence excessive

Words and Phrases — 'Gratification' — Prevention of Corruption Act 1961

The accused, a policeman, was charged for corruptly soliciting gratification for himself from a restricted resident who had left his restricted area without the permission of the police. His counsel argued that since the complainant had said that other policemen were involved, the charge should have included them. He also urged that the prosecution's failure to call a witness, instead making him available to the defence, raised an adverse inference against the prosecution. Counsel also argued that trap money did not constitute gratification.

Held, affirming the conviction but varying the sentence:

(1) There was no concerted action or conduct of the various policemen to indicate any common intention to share the money. The evidence showed that the appellant not only demanded for the money but also took the initiative to help the complainant obtain the money. The trial judge was correct, under the circumstances, to conclude that the other vague demands were mere attempts by the other policemen to cash in on the situation.

(2) The prosecution is not relieved of the adverse presumption under s 114(g) of the Evidence Act 1950, by merely making available a witness to the defence, only in cases when they are unable to establish a prima facie case. In this case, sufficient evidence had been adduced by the prosecution to prove the charge, and no adverse presumption had been raised by their failure to call a witness.

(3) Once the facts that the appellant had solicited for the $500 and that sum was paid and recovered from him, the presumption under s 14 of the Prevention of Corruption Act 1961 ('the Act') comes into play and the appellant has to disprove it on the balance of probability.

(4) The definition of gratification in s 2 of the Act is not restrictive and it includes money. To prove the charge, the prosecution need only show that the appellant received the money as an inducement or reward.

(5) The trial judge had overlooked the requirement of s 13 of the Act, which is of a mandatory nature. The sentence of eight months in this case is excessive and the trial judge, in imposing it, did not take into consideration the additional punishment under s 13. Sentence is therefore varied to four months, and a fine of $500, in default three months' imprisonment.

Cases referred to

1 *Abdullah Zawawi* v *PP* [1985] 2 MLJ 16 (distd)
2 *PP* v *Yuvaraj* [1969] 2 MLJ 89 (folld)
3 *PP* v *Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 (folld)
4 *Lee Mun Foong* v *PP* [1976] 2 MLJ 16 (folld)

Legislation referred to

Evidence Act 1950 s 114(g)
Prevention of Corruption Act 1961 ss 2, 4(a), (c), 13, 14

FH D'Cruz for the appellant.
Mohd Shariff bin Abu Samah for the Public Prosecutor.

Cur Adv Vult

Wan Yahya J: The facts of this case as disclosed in the records could be summarized as follows. One day a restricted resident left his restricted area at Durian Tunggal. Instead of obtaining the written permission of the OCPD he had chosen to get the blessings of a friendly constable at that police station. He subsequently left for Kuala Lumpur at 11am and returned at 5pm on the following day.

On his return, he discovered that almost every policeman at the station knew about his unlawful spree and according to him a few policemen solicited or insinuated the solicitation of bribes. Out of the several names mentioned by him, the learned sessions judge considered three policemen, Wan Chek, Hamzah and the appellant whom she felt had made some form of demand. On further reflections, she discounted Wan Chek because of his vague and unspecified request for 'some money'. That left two persons, ie Hamzah and the appellant who had separately made a demand of $500 each. Both men are tried before the sessions court. Hamzah did not take the bite at the bait offered by the Biro Siasatan Negara and he was subsequently acquitted. The appellant was less fortunate. The bait was discovered under his swivel chair.

These multiple accounts of demands by the complainant form the basis of the appellant's grounds of appeal. His counsel argued that the facts as recounted by the complainant did not support the charge, in particular the words 'did corruptly solicit for yourself'. He contends that as other constables were involved, the charge, should have been suitably worded to include them. The omission to include the others, according to counsel, had confused the appellant on the precise charges against him and would embarrass his defence.

The material question to be asked here is whether the sessions court judge was correct in her finding as to the individual as opposed to collective demand as claimed by the appellant. The learned sessions court judge, after carefully considering the complainant's account of the various demands, came to the conclusion that only two resolute demands came separately from Constable Hamzah and the appellant and that the other vague demands were mere attempts by other policemen to cash in and make something of their own.

I have read the records, particularly those passages referred to by counsel but I cannot see any concerted action or conduct of the various policemen to indicate any common intention to share the money. In one particular instance, one policeman was said to have commented that everyone at the station except the appellant knew about his absence — thus indicating that they could not be making the demand on the appellant's behalf. In another part of his testimony, the complainant said that just before he saw the appellant, Constable Zam had told him everyone knows about it and they were unable to help. Again this is suggestive that the other policemen were no longer persuing the bribe. What is of utmost importance here is whether the appellant did solicit for the $500. It would appear from the evidence that he not only demanded for the money but also took the initiative to enable the complainant to get the $500 from his sister.

Under these circumstances, the learned sessions court judge was entitled to draw her conclusion and to arrive at her findings of facts.

Counsel further contends that failure on the part of the prosecution to check the evidence of a witness, Constable Wan Chek, instead of merely making him available to the defence, is fatal to this case.

In support of this contention, counsel cited *Abdullah Zawawi* v *PP*,[1] in particular to the following passage of the judgment of Salleh Abas LP:

> The practice of making available a witness or witnesses from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus invoking the often-quoted presumption of adverse inference under s 114(g) of the Evidence Act 1950. But where the prosecution evidence falls short of proving a prima facie case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution's case.

My reading of the above judgment is that the prosecution is not relieved of the adverse presumption under s 114(g) of the Evidence Act 1950, by merely making available a witness to the defence, only in cases when they are unable to establish a prima facie case. In our present case, the accused is charged with soliciting gratification for himself and there are sufficient evidence on this adduced by the prosecution. The mere possibility of having another version of collective demand for the gratification does not ipso facto involve the rationale laid down in *Abdullah Zawawi*'s case.[1]

In his third and fourth grounds of appeal, counsel for the appellant argue that the sessions court judge erred in invoking s 14 of the Prevention of Corruption Act 1961 and even if so invoked the offence under s 4(c) is nevertheless unproved. He based his arguments on (a) the imperfections of the charge as framed; (b) trap money not being part of gratification; and (c) discrepancies in the evidence of prosecution witness. The matter raised in (a) has been dealt with earlier. The appellant was charged with soliciting gratification for himself and the evidence adduced as accepted by the learned sessions court judge shows that he did so accept.

No doubt there were vague suggestions by the complainant of solicitations by other policemen but these relate to other offences and did not form part of the charge against the appellant. The learned sessions court judge had come to a finding of fact that the appellant had solicited for the $500 and that sum was paid and recovered from him by the BSN officers. Once such facts had been established, the presumption under s 14 will come into play and then it is for the appellant to disprove it on the balance of probability. The effect of s 14 was expressed in the following words in *PP* v *Yuvaraj*[2] at p 90:

> Where a defendant is charged with an offence under s 4(a) of the Prevention of Corruption Act 1961, to which s 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence, viz (1) that a gratification was paid or given to or received by the defendnt and (2) that at the same time of the payment, gift or receipt he was in the employment of a public body. Upon proof of these two ingredients the existence of the third ingredient, viz (3) that the gratification was paid or given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of that public body, is to be presumed 'unless the contrary is proved'.

Counsel next contends in (b) that the $500 cash provided for the trap is not gratification within the meaning of s 2 of the Act and therefore the trap money found on the appellant is not 'gratification' as envisaged by law.

I am unable to accept this contention. The definition of gratification in s 2 is not restrictive and it includes money. To prove the charge under this section, the prosecution need only show that the appellant received the money as an inducement or reward. Once it could be proved that he had received the money the presumption under s 14 will apply.

As for the arguments on discrepancies and corroboration mentioned in (a) above, I need only reproduce the

comments of Raja Azlan Shah FJ (as he then was) in *PP* v *Datuk Haji Harun bin Haji Idris (No 2)*[3] at p 19:

> The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.
>
> It is also salutary to remember that in a corruption case, direct testimony of wholly disinterested witnesses can seldom, if ever, be forthcoming. It is invariably circumstantial evidence which has to be availed of in such a case.

The learned sessions court judge was aware of these minor dissimilarities between the evidence of the witness and had come to a correct conclusion and defence as a whole. She found that the defence had failed to raise a reasonable doubt in her mind as to the prosecution case. I see no reason for interfering with these findings of fact. The appeal against conviction is hereby dismissed.

On conviction, the learned sessions court judge sentenced the appellant to eight months imprisonment and overlooked the requirement of s 13 of the Act, the mandatory nature of which was confirmed in the following terms by Wan Suleiman FJ in *Lee Mun Foong* v *PP*[4] at p 18:

> My answer to this question reserved for the decision of this court is that the provision of s 13 of the Prevention of Corruption Act 1961 is applicable in every case of a conviction under the said Act and not restricted only to instances where money and indeed any other form of gratification, the subject matter of the offence, has not been recovered.

It has been submitted to me that having regard to the entire circumstances of this case, the sentence of eight months is excessive. I agree with counsel on this point. It would appear that in imposing the sentence of eight months, the learned sessions court judge did not take into consideration the additional punishment required under s 13. Had she been otherwise informed about that punishment, I am sure she could have considered the combined punishment as a whole and imposed a lesser sentence than eight months.

I would therefore order that the sentence of eight months be varied to a term of four months and in exercise of my revisionary powers, I hereby order that the appellant be additionally fined in a sum equivalent to the bribe offered, ie $500, in default 3 months' imprisonment.

Order accordingly.

Solicitors: *Tay Leong Siak & Co.*

Reported by *Zarinah Marican*